IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

RAI STRATEGIC HOLDINGS, INC. and R.J. REYNOLDS VAPOR COMPANY, Plaintiffs and Counterclaim Defendants, v. ALTRIA CLIENT SERVICES LLC; PHILIP MORRIS USA INC.; and PHILIP MORRIS PRODUCTS S.A., Defendants and Counterclaim Plaintiffs.	Case No. 1:20-cv-00393-LO-TCB

REPLY IN SUPPORT OF REYNOLDS'S MOTION *IN LIMINE* TO EXCLUDE NEWLY ADDED REFERENCES TO MENTHOL PRODUCTS AND ALLEGATIONS AGAINST REYNOLDS IN PRODUCT-LIABILITY CASES

REPLY ARGUMENT

No "context" (Dkt. 1278 at 1) is required to understand that the questions asked by Philip Morris's counsel at the June 3, 2022 update deposition of Dr. James Figlar sought to elicit testimony that is irrelevant, inflammatory, and foreclosed by Judge O'Grady's prior rulings. This is a patent case. Yet, in its response, Philip Morris continues to assert the right to inquire about such irrelevant matters as "[n]ews reports confirm[ing] that Reynolds has engaged in significant efforts to improve its public standing related to menthol cigarettes in the African American Community." *Id.* at 3. And "the fact that FDA cautioned Reynolds that the sale of flavored products may attract minors." *Id.* at 4. Those lawyerly glosses on the questions asked by Philip Morris's counsel during the deposition conceal the true import of those questions, which is to bring before the jury allegations that have nothing to do with patent infringement—such as "targeting African-Americans with menthol tobacco products." Dkt. 1273 at 1. Even now, Philip Morris recognizes that these are "topics that any lawyer would know are outside the bounds of permissible testimony for *either* side in a patent trial." Dkt. 1278 at 4-5.

Exactly right. That concession is fatal to Philip Morris's argument that its questions were proper in the event that "Reynolds opened the door during Dr. Figlar's direct examination." Dkt. 1278 at 2. Philip Morris cannot invent a justification based on door-opening while at the same time recognizing that the subject-matter of its questions "are outside the bounds of permissible testimony." There is no reasonable basis for thinking that Dr. Figlar would be permitted to testify on direct examination about impermissible topics, and thus no conceivable door to be opened for Philip Morris to follow up with its own impermissible questions. Moreover, these topics were already excluded by Judge O'Grady's rulings barring "[t]estimony regarding a 'youth smoking epidemic' or the targeting of electronic cigarettes to young people" and arguments that "invoke[ ] an improper racial or nationalistic animus." Dkt. 1184-1 at 7, 11. Again, Philip Morris cannot

premise a door-opening argument on evidence that it knows will not be admissible. Finally, Philip Morris's counsel asked Dr. Figlar himself "what do you anticipate testifying to in your direct examination?" Ex. 2, June 3, 2022 Figlar Dep. Tr. 20:2-3; *see also id.* 21:5-24:5 (Dkt. 1287-1). Nothing in Dr. Figlar's answers gave Philip Morris grounds for asserting that he would testify about these impermissible topics. *See, e.g., id.* at 20:12-14 ("I think, you know, in essence my testimony is going to be about reduce risk development, overall what Reynolds has done over the years.").

Philip Morris also claims that it was proper to ask Dr. Figlar about allegations in product-liability cases against Reynolds involving personal injury or death (*see* Dkt. 1273 at 7) because the "inquiry was related to Dr. Figlar's personal background." Dkt. 1278 at 4. "[A]llegations against Reynolds in [ ] product liability cases" (Dkt. 1273 at 2) have nothing whatsoever to do with Dr. Figlar's personal background. If the aim was really to cross-examine Dr. Figlar about "his extensive past testifying experience" (Dkt. 1278 at 4), there would be no need to ask him "to summarize for the jury in this case what the allegations were in the product liability cases that you testified in." Dkt. 1273-1 at 147:21-48:2. The only conceivable purpose of this question was to draw out derogatory allegations by injured plaintiffs in other cases and thus portray Reynolds and Dr. Figlar in a negative light.

Philip Morris devotes much of its response to side issues rather than the substance of its counsel's questions. There is no pending question for the Court to resolve over whether Judge O'Grady "*sua sponte* directed Reynolds to submit" Dr. Figlar to a deposition or, as Philip Morris recognized at the May 20, 2022 hearing, Reynolds "thought it was important enough to write a letter to tell us about five other people [and] *offer a deposition*." May 20, 2022 Hr'g Tr. 21:11-13. Judge O'Grady's ruling was clear: the Court rejected Philip Morris's request for a proffer of Dr.

Figlar's proposed testimony and directed Philip Morris to "take his deposition" to avoid a dispute about whether "his actual testimony is a little different" from a description in a proffer. Dkt. 1273-2 at 25:10-15. The Court was also clear about its expectation for the deposition: "What I expect your deposition will be is, 'What have you learned from these gentlemen that you believe will affect your testimony as you prepare to testify in this case?" *Id.* at 25:10-26:4. Judge O'Grady did say that "the time to have Dr. Figlar speak to these people was before he was deposed" (Dkt. 1278 at 1), but that was before Reynolds clarified that the topics of the discussions concerned FDA actions *after* Dr. Figlar's original depositions during discovery. May 20, 2022 Hr'g Tr. at 15:15-23 ("this is not, I don't think, a fault of either side; this is just the way the FDA works"; "the FDA . . . has authorized our Vuse Solo device. That happened after his deposition separate and apart from this case"; and noting that Dr. Figlar is "a 30(b)(6) witness on those topics of our submissions to the FDA, including the PMTAs"). As to the assertion that Reynolds produced 23,000 pages of documents in the weeks preceding trial (Dkt. 1278 at 1), that issue too was resolved at the May 20, 2022 hearing, where Reynolds explained that those documents related to a "recent Alto submission on the PMTA" that Reynolds "ha[s] no intention of using" but nonetheless, "out of an abundance of caution," produced in this case. *Id.* at 13:1-19. Philip Morris's counsel confirmed that "I don't think we have any dispute" as to that production of documents, and Judge O'Grady confirmed that "I think we're in good shape there." *Id.* at 19:1-12.

Finally, Philip Morris states, in bold italics, that "Philip Morris proposed a stipulation stating that neither party would raise these issues." Dkt. 1278 at 2. In fact, it was Reynolds that proposed the stipulation, and it was Philip Morris that rejected the stipulation as offered, extensively revising it to "delete the specific guidance [Reynolds] intend[ed] to seek from the

Court regarding the propriety of the questions directed to Dr. Figlar." Dkt. 1278-1 at 1. A redlined version of Philip Morris's edits to Reynolds's proposed stipulation is attached as Exhibit 1. Reynolds also stated that it "remain[ed] open to attempting to reach a resolution on some or all of these issues in the form of a suitable set of Agreed MILs prior to appearing in Court on Wednesday morning." *Id.* Given the Court's direction to file any "new motion in limine" to avoid a delay at the start of trial, June 3, 2022 Hr'g Tr. 32:13-17, Reynolds filed the present motion so that it could be fully briefed in advance.

CONCLUSION

Reynolds respectfully requests that the Court grant this motion and enter an order barring Philip Morris from introducing at trial any evidence, testimony, or argument relating to alleged racial targeting and youth marketing, prospective FDA action regarding menthol or flavored tobacco products, and allegations against Reynolds in product-liability cases, and for such other relief as this Court deems just and proper.

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